

DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS
Title 3, California Code of Regulations
Section 3700, Subsection(c), Oak Mortality Disease Control
INITIAL STATEMENT OF REASONS/
POLICY STATEMENT OVERVIEW

Description of the Public Problem, Administrative Requirement, or Other Condition or Circumstance the Regulation is Intended to Address

This regulation is intended to address the obligations of the California Department of Food and Agriculture to protect the agricultural industry of California and prevent the introduction and spread of injurious plant pests.

Specific Purpose and Factual Basis

The specific purpose of Section 3700 is to provide authority for the State to mitigate the effects of oak mortality disease (sudden oak death) on the agricultural industry, which includes native tree stands, by establishing a program to arrest the artificial spread of the disease to additional areas; thereby protecting California's agricultural industry and environment. Subsection 3700(c), lists the articles and the commodities covered under this regulation.

The factual basis for the determination by the Department that the emergency amendment of Section 3700(c) was necessary is as follows:

The Department of Food and Agriculture has found that oak mortality disease (sudden oak death) caused by a fungus, *Phytophthora ramorum*, presents a clear and present danger to the native stands of oak and other trees, the nursery industry, other agricultural commodities and plant life (including ornamental plantings) of California. The Department readopted Section 3700 to implement a program to arrest the artificial spread of the disease. Continued action is necessary to contain and minimize the destructive impact of this pest and disease at the earliest possible time. On April 9, 2004, the Administrator of the United States Department of Agriculture

(USDA), Animal and Plant Health Inspection Services (APHIS) issued the first emergency order restricting the interstate movement of nursery stock from California nurseries located outside the area regulated under Section 3700. On April 22, 2004, USDA, APHIS issued a new order that replaced that issued on April 9, 2004. On April 23, 2004, USDA, APHIS issued a clarification of its April 22, 2004 order. Through this last federal emergency order and its subsequent clarification, the USDA, APHIS identified additional plant species as regulated associated articles and as such, these associated articles are prohibited interstate movement from all California nurseries unless properly certified under the provision of the federal emergency order.

Since April 2004, the USDA, APHIS has issued a series of federal emergency orders that amended the articles regulated including on: 1) August 5, 2004, 2) December 21, 2004, 3) August 3, 2005, 4) September 14, 2005, and 5) November 15, 2005 (effective November 28, 2005). As a result, it was necessary to make emergency amendments to the State's regulation governing the intrastate movement of hosts and associated articles (nursery stock) with these federal orders. Without a parallel State regulation that is substantially the same as the federal domestic quarantine and related federal orders, the USDA cannot regulate less than the entire State.

On February 10, 2006, the USDA, APHIS again issued a new federal order that became effective February 20, 2006. The USDA has deemed this action necessary due to:

- The identification of additional plant taxa that can be infected by *P. ramorum* and needs to be regulated as "associated hosts" in order to control the artificial spread of this disease.
- The completion of Koch's postulates on three species resulting in moving those species from the USDA's list of "plants associated with *P. ramorum*" to the USDA's list of "proven regulated hosts."
- Changes in some of the nomenclature and the need to stay current and to clearly

communicate the USDA's intent of what plants are regulated.

This federal order specifically affects the interstate movement of nursery stock from the States of Washington, Oregon, and California. Under authority of this order, nurseries operating under a compliance agreement may continue to ship "Hosts and Associated Plants" including these newly listed plants. Any other nurseries containing these newly listed associated plants must have been properly inspected, sampled and tested and placed under a Compliance Agreement by February 20, 2006, to be able to move plants interstate.

This action is authorized by the Plant Protection Act of June 20, 2000, as amended, Section 412(a), 7 U.S.C. 7712(a), which authorizes the United States Secretary of Agriculture to prohibit or restrict the movement in interstate commerce of any plant, plant part, or article if the Secretary determines the prohibition or restriction is necessary to prevent the dissemination of a plant pest within the United States.

The February 10, 2006 federal order added 13 new plant species to its revised "APHIS List of Hosts and Plants Associated with *Phytophthora ramorum* (Revision dated 3 February 2006)." This included: *Abies magnifica* (red fir), *Acer davidii* (striped bark maple), *Ardisia japonica* (ardisia), *Euonymus kiautschovicus* (spreading euonymus), *Gaultheria shallon* (salal, Oregon wintergreen), *Hamamelis x intermedia* [(*H. mollis* & *H. japonica*) (hybrid witchhazel)], *Leucothoe axillaries* (fetter-bush, dog hobble), *Magnolia grandiflora* (Southern magnolia), *Michelia maudiae* (Michelia), *Michelia wilsonii* (Michelia), *Osmanthus decorus* [(=*Phillyrea decora*; =*P. vilmoriniana*) (Osmanthus)], *Prunus lusitanica* (Portuguese laurel cherry) and *Rosa rugosa* (rugosa rose). These plants were not previously listed as regulated under Section 3700. Therefore, to ensure harmonization with the federal order, these plants were added to Section 3700(c) as "associated articles."

Koch's postulates were completed for the following three associated hosts: *Adiantum aleuticum* (Western maidenhair fern), *Adiantum jordanii* (California maidenhair fern) and *Rhamnus californica* (California coffeeberry). As a result, these plants were deleted from the APHIS'

“Plants Associated with *Phytophthora ramorum*” and added to their list, “Proven Hosts Regulated for *Phytophthora ramorum*.” The scientific names for two proven hosts were updated: *Frangula californica* [(=*Rhamnus californica*) (California coffeeberry)] and *Frangula purshiana* [(=*Rhamnus purshiana*) (cascara)]. Therefore, to ensure harmonization with the federal order, these changes were made to Section 3700(c).

The USDA refined six of its entries on the proven host list to clarify what it intends to be regulated, these include: *Pieris formosa* (and *P. formosa* x *P. japonica* and all hybrids of *P. formosa*) (Himalaya andromeda); *Quercus parvula* var. *shrevei* and all nursery grown *Q. parvula* (Shreve’s oak); *Viburnum plicatum* (doublefile viburnum); *Pseudotsuga menziesii* var. *menziesii* and all nursery grown *P. menziesii*; mountain andromeda (*Pieris floribunda* and *P. floribunda* x *P. japonica* and all hybrids of *P. floribunda*); and Japanese pieris (*Pieris japonica* and all hybrids of *P. japonica*). Therefore, to ensure harmonization with the federal order, these changes were made to Section 3700(c) as follows:

- 1) *Pieris formosa* (Himalaya pieris) has been changed to “*Pieris formosa* and *P. formosa* x *P. japonica* and all hybrids of *P. formosa* (Himalaya andromeda);”
- 2) *Quercus parvula* var. *shrevei* has been modified by adding “and all nursery grown *Q. parvula*,”
- 3) *Viburnum plicatum* var. *tomentosum* (doublefile) has been changed to “*Viburnum plicatum* (doublefile viburnum);”
- 4) *Pseudotsuga menziesii* var. *menziesii* has been modified by adding “and all nursery grown *P. menziesii*,”
- 5) Brouwer’s beauty andromeda (*Pieris floribunda* x *japonica*) has been changed to “mountain andromeda (*Pieris floribunda* and *P. floribunda* x *P. japonica* and all hybrids of *P. floribunda*);“
- 6) Forest flame andromeda (*Pieris formosa* x *japonica*) has been deleted from Section 3700(c);
- 7) Variegated and flaming silver andromeda (*Pieris japonica*) has been changed to

- “Japanese pieris (*Pieris japonica* and all hybrids of *P. japonica*);” and,
- 8) The deletion of *Pieris formosa* var. *forrestii* (Chinese pieris) and *Pieris formosa* var. *forrestii* x *Pieris japonica* (pieris) from Section 3700(c).

Finally, several changes were made that clarify the common names of some of the hosts or potential carriers of the pathogen regulated under Section 3700(c), including:

- 1) The addition of “Scotch” to “heather” after *Calluna vulgaris*;
- 2) The deletion of “a” and addition of “California” to “honeysuckle” after *Lonicera hispidula*;
- 3) The addition of “California” to “black oak” after *Quercus kelloggii*; and,
- 4) The deletion of “arrowwood” and the addition of “Bodnant viburnum” after *Viburnum x bodnantense*.

Therefore, as the federal order became effective on February 20, 2006, the Department is proposing these emergency amendments to Section 3700(c) be continued to provide the necessary regulatory framework for a State program to continue to arrest the intrastate and interstate spread of this disease and be in compliance with the February 10, 2006 federal order.

The Department amended this regulation because it is necessary to continue to have authority for an established statewide program in order to arrest the artificial spread of the disease to additional areas and harmonize the State’s regulation governing the intrastate movement of nursery stock with the latest federal order that governs the interstate movement of California nursery stock. Immediate amendment of this regulation was necessary to mitigate the effects of this disease on the agricultural industry, which includes native tree stands. Additionally, it was necessary to immediately amend this regulation to avoid more stringent federal restrictions being placed against the State to prevent the interstate movement of articles and commodities that may carry *Phytophthora ramorum*. The continued implementation of this regulatory action is necessary to prevent the USDA, APHIS from considering the entire state as infested with *Phytophthora ramorum*, rather than just the current 14 regulated counties. If this were to occur,

there would likely be additional detrimental quarantine requirements directed against California commodities by our international trade partners.

These facts and circumstances clearly indicate that the spread of oak mortality disease presents a clear and imminent danger to property and, therefore, constitutes an emergency. The Department was therefore compelled to take immediate action to mitigate the damage to property and preserve the general welfare.

These emergency amendments of Section 3700(c) established new hosts and associated articles, eliminate some regulated articles by changing them to regulated hosts and clarified by scientific and/or common name what is regulated. To protect California's agricultural industry, it was necessary to immediately regulate movement of hosts and potential carriers that may transfer the pest from the infested area. Therefore, it was necessary to amend Section 3700(c) on an emergency basis.

Estimated Cost or Savings to Public Agencies or Affected Private Individuals or Entities

The Department of Food and Agriculture has determined that Section 3700(c) does not impose a mandate on local agencies or school districts, except that the agricultural commissioner of a county under regulation has a duty to enforce it. No reimbursement is required under Section 17561 of the Government Code because the 14 affected county agricultural commissioners requested that when established as a new host or associated article by a federal order, Section 3700, subsection (c) be changed to reflect that.

The Department has also determined that the amended regulation will involve no additional costs or savings to any state agency, no nondiscretionary costs or savings to local agencies or school districts, no reimbursable savings to local agencies or costs or savings to school districts under Section 17561 of the Government Code, and no costs or savings in federal funding to the State.

The Department has determined that the proposed action will not have a significant adverse economic impact on housing costs. The Department of Food and Agriculture has made an initial

determination that the proposed action will not have a significant, statewide adverse economic impact directly affecting California businesses, including the ability of California businesses to compete with businesses in other states.

The Department is not aware of any additional cost impacts that a representative private person would necessarily incur in reasonable compliance with the proposed action. There was an ongoing program in place prior to this emergency amendment of the regulation. After consulting with the known affected individuals/businesses and/or the county agricultural commissioners in the regulated area, the program concluded there are no anticipated new economic impacts or newly affected parties due to this proposed action.

Therefore, the proposed action will not result in any new costs for compliance for individuals/businesses previously regulated in the 14 counties prior to this emergency amendment. Therefore, the cost impact of the amended regulation on a representative business is not expected to be significantly adverse.

Assessment

The Department has made an assessment that this amendment to the regulations would not (1) create or eliminate jobs within California, (2) create new businesses or eliminate existing businesses within California, or (3) affect the expansion of businesses currently doing business within California.

Alternatives Considered

The Department of Food and Agriculture must determine that no alternative considered would be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the proposed action.

Information Relied Upon

The Department relied upon the following studies, reports, and documents in the amendment of Section 3700:

E-mail dated March 27, 2006 from Vince Arellano to Stephen Brown.

“*Phytophthora ramorum* (ramorum blight and dieback, sudden oak death); Listing and Regulation of Plants Recently Reported Associated with *P. ramorum*,” dated February 10, 2006; and, “APHIS List of Regulated Hosts and Plants Associated with *Phytophthora ramorum*,” dated February 3, 2006, signed by Paul R. Eggert for Richard L. Dunkle.

Facsimile transmission of a letter dated August 20, 2004 to Secretary A.G. Kawamura from David C. Frieders.

Facsimile transmission of a letter dated June 30, 2004 from Ronnie K. Eaton to Nick Condos.

Facsimile transmission of a letter dated June 30, 2004 to Dr. Dennis E. Mayhew from Steve Hajik.

Letter dated June 30, 2004 from David R. Whitmer to Dr. Dennis E. Mayhew.

Facsimile transmission of a letter dated June 30, 2004 to Dr. Dennis E. Mayhew from Stacy K. Carlsen.

Facsimile transmission of a letter dated June 30, 2004 to Dr. Dennis E. Mayhew from Edward P. Myer.

Letter dated June 28, 2004 from David W. Moeller to Dr. Dennis E. Mayhew.

Facsimile transmission of a letter dated June 28, 2004 to Dr. Dennis E. Mayhew from John Westoby.

Letter dated June 28, 2004 from Gail M. Raabe to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from David Bengston to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from Greg Van Wassenhove to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from Susan Cohen to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from Eric Lauritzen to Dr. Dennis E. Mayhew.

Letter dated June 24, 2004 from John E. Falkenstrom to Dr. Dennis E. Mayhew.